Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02–746 OF 2005, W–02–758 OF 2005, W–02–790 OF 2005, W–02–804 OF 2005 AND W–02–395 OF 2006

GOPAL SRI RAM, LOW HOP BING AND RAUS SHARIF JJCA

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Constitutional Law — Courts — Jurisdiction of Federal Court — Doctrine of stare decisis — Whether Court of Appeal bound by Federal Court's decision if rendered in ignorance of statute

Land Law — Indefeasibility of title and interests — Forged charge — Fraud committed by solicitor who acted as agent for registered chargee in transaction — Whether solicitor's knowledge of fraud imputed to registered chargee — Whether registered charge indefeasible — National Land Code 1965 s 340(2)

Land Law — Indefeasibility of title and interests — Forged transfer — Bona fide purchaser for value — Whether proviso to s 340(3) National Land Code applicable — Adorna Properties v Boonsom Boonyanit

The plaintiffs owned land in Seberang Perai, Penang. The plaintiffs had agreed to sell the land to the first defendant. An agreement was to be drawn up by the second defendant, an advocate and solicitor and a partner in the third defendant firm. The plaintiffs deposited their title deeds with the third defendant firm and signed blank memoranda of transfers. Not having received the balance purchase price, they made inquiries and discovered that the third defendant firm had prepared and presented a third party charge, purportedly signed by the plaintiffs, in favour of the fourth defendant bank to secure a loan to the fifth defendant company. The plaintiffs brought an action to recover their land by removing the charge. The plaintiffs argued that the fourth defendant bank had been party or privy to the fraud owing to the acts and omissions of its officers. The trial judge found that the first defendant had no genuine intention of acquiring the land but had merely used the lands as security for the loan. The second defendant must have been a party to the fraud. The third defendant firm had been retained by the fourth defendant bank to prepare the necessary legal documentation for the loan. Thus, the legal consequence was that the second and third defendants were for all intents and purposes the agents of the fourth defendant in the transaction. However, the learned judge found no evidence of fraud on the part of the fourth defendant bank. The trial judge thus held that the bank's registered charge was immediately indefeasible notwithstanding that the charge had been obtained under a forged instrument. The plaintiffs appealed.

Held, allowing the plaintiff's appeal:

(1) (per **Gopal Sri Ram JCA**) The Court of Appeal declined to reverse the finding of fact by the trial judge that the fourth defendant bank had not been party or privy to the fraud. Firstly, the finding was one of pure fact, based on the learned judge's assessment of the credibility of witnesses. The Court of Appeal would defer to its' views on the point. Secondly, it is the settled practice that where the primary trier of fact has acquitted a defendant on a charge of fraud, such a finding would not be reversed save on the clearest grounds. The Court of Appeal was most reluctant to find 'appellate fraud' on the part of a defendant save in an exceptional case. However, since the plaintiffs were entitled to succeed in the appeal on a plain interpretation of s 340(2)(a), it was unnecessary to also rule in their favour on the forgery ground (see paras 5–6, 21); *Ryan v Jarvis* [2005] UKPC 27 and *Akerhielm v De Mare* [1959] AC 789 followed.

(2) (per **Gopal Sri Ram JCA**) Despite the findings against the second defendant solicitor and third defendant firm, the trial judge found for the fourth defendant bank in respect of the plaintiffs' claim. He accepted, following *Doshi*, that the second defendant's knowledge of the fraud could not be imputed to the fourth defendant who was not privy to the fraud. However, *Doshi* was a case in which the court had to determine whether a solicitor's knowledge of fraud could be imputed to his client, thereby rendering a master liable at common law for the fraud (in the widest sense) by an agent. It was not a case concerning an impeachment of title under s 340(2)(a) of the National Land Code 1965 ('NLC') (see paras 7, 9); *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 distinguished.

(3) (per **Gopal Sri Ram JCA**) Section 340(2)(a) NLC entitles a plaintiff to defeat a registered title or interest in either of two distinct circumstances. He may do so by showing that: (a) the holder was party or privy to the fraud or misrepresentation; or (b) the holder's agent was party or privy to the fraud or misrepresentation. Section 340(2)(a) does not require that the holder of the registered title or interest himself must have had knowledge or notice (actual or imputed) of the agent's fraud or that he had authorised the commission of the fraud (see para 12); *United Overseas Finance Ltd v Victor Sakayamary* [1997] 3 SLR 211 followed.

(4) (per **Gopal Sri Ram JCA**) Having regard to the express wording of s 340(2)(a) of the NLC the learned trial judge had asked himself the wrong question. Having satisfied himself that the fourth defendant was neither a party nor privy to the fraud, he nevertheless held that the second defendant was a party to the fraud and/or misrepresentation and further that the second and third defendants were the agents of the fourth defendant in the transaction. The trial judge failed to go on to consider the effect of the agent's fraud on the transaction, applying the clear words of s 340(2)(a) NLC. The fraud of the second defendant as agent of the fourth defendant bank rendered the registered charge defeasible. The plaintiffs were entitled to succeed on this ground alone (see paras 13–14).

(5) (per **Gopal Sri Ram JCA**) Furthermore, s 340(3) (a) and (b) employ the word 'subsequently' which means that where a registered proprietor gets on the register by any of the means set out in s 340(2), and 'subsequently' transfers that land to another, the title of that other is also defeasible unless that subsequent transfer is made to a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser (see para 18).

(6) (per **Gopal Sri Ram JCA**) The fourth defendant was not a bona fide purchaser protected by the proviso to s 340(3) of the NLC because 'a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not' (see para 14); *Lloyd v Grace, Smith & Co* [1912] AC 716 followed. The burden to demonstrate that one is a purchaser in good faith and for valuable consideration lies on the person asserting it. In this case the fourth defendant had not so demonstrated. Thus the present case did not fall within the proviso to s 340(3) (see para 15); *Bhup Narain Singh v Gokhul Chand Mahton* LR 61 IA 115; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320 referred.

(7) (per **Gopal Sri Ram JCA**) The instrument by which the charge was created was a forgery. The trial judge quite correctly treated himself as bound by *Adorna Properties*. However this court had in *Subramaniam v Sandrakasan* set out the reasons why the Federal Court's judgment in *Adorna Properties* must be disregarded (see para 16); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 not followed and *Subramaniam v Sandrakasan* [2005] 6 MLJ 120 followed.

(8) (per **Gopal Sri Ram JCA**) *Adorna Properties* does not declare a principle of the common law based on policy considerations such as was the case of *Donoughue v Stevenson* [1932] AC 562. It is merely a case involving the interpretation of a provision in a statute, namely, s 340 of the NLC. *Adorna Properties* was decided without regard to another provision in the NLC and without reference to *M & J Frozen Foods*, a prior decision of the Supreme Court which held that the NLC creates deferred and not immediate indefeasibility. Thus *Adorna Properties* was rendered per incuriam and was not binding even on a lower court (see paras 19–20); *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 referred and *Subramaniam v Sandrakasan* [2005] 6 MLJ 120 followed.

(9) (per **Raus Sharif JCA**) Upon holding that the second defendant was not just privy but a party to the fraud and upon further holding that the second and third defendants were for all intents and purposes the agents of the fourth defendant, the trial judge should have found for the plaintiffs by reason of s 340(2)(a) NLC. The trial judge was wrong to hold that the second defendant's knowledge of the fraud could not be imputed to the fourth defendant
(see para 80).

(10) (per **Raus Sharif JCA**) Section 340(2)(a) NLC expressly provides that the title of a proprietor may be defeated on the ground of a fraud or forgery to which

that proprietor or his agent was a party. Here the second and third defendants were, as found by trial judge, the agents of the fourth defendant and the second defendant was party to the fraud. Thus the charge registered in favour of the fourth defendant could not be valid and indefeasible. The trial judge's conclusion was based on an erroneous reading of the decision in *Doshi*. *Doshi* could not be relied upon in interpreting s 340(2) NLC (see para 81).

(11) (per **Low Hop Bing JCA** dissenting) The question to be decided in this appeal may be phrased: 'Where a borrower retains solicitors to prepare and present documents as security for a loan granted by a bank, and the borrower pays the fees and costs for the solicitors' service, are the solicitors the agents of the bank?' In contrast the real issue in *Lee Yoke Chye* was whether, when a solicitor receives the issue document of title, he receives it as 'stakeholder' or as 'agent' for the buyer who retains him to act in the purchase of the land? It was held in *Lee Yoke Chye* that the solicitor held the document of title as agent for the person who retained the firm of solicitors, the purchaser. Since the third defendant solicitors were retained by the fifth defendant company, paying the fees and costs for the solicitors' service, the third defendant solicitors were at the material time, in law and in fact, the agents of the fifth defendant company (see paras 46–49); *Lee Yoke Chye v Toh Thiam Hock & Co* [1987] 1 MLJ 122 distinguished

(12) (per **Low Hop Bing JCA**, dissenting) Further s 3 of the Legal Profession Act 1976, defines 'client' as including, in relation to non-contentious business, any person, who as a principal, retains or employs an advocate and solicitor, and any person for the time being liable to pay an advocate and solicitor for his service and costs. Here, the preparation and presentation of the charge documents come within the ambit of 'non-contentious business' which the fifth defendant had retained the third defendant firm of solicitors. The retainer provided for the contractual relationship between the fifth defendant and the third defendant solicitors. Thus, knowledge of the solicitors' fraud and/or misrepresentation could not be imputed to the fourth defendant bank. The charge was valid and indefeasible. The grounds for sustaining the validity and indefeasibility of the registered charge were different from those of the learned trial judge, but the result was the same (see paras 51, 53, 56 & 59).

[Bahasa Malaysia summary

Plaintif-plaintif memiliki tanah di Seberang Perai, Pulau Pinang. Plaintif-plaintif telah bersetuju untuk menjual tanah tersebut kepada defendan pertama. Satu perjanjian telah dibuat oleh defendan kedua, seorang peguambela dan peguamcara dan juga rakan kongsi dalam firma defendan ketiga. Plaintif-plaintif telah menyimpan surat ikatan hak milik mereka dengan firma defendan ketiga dan menandatangani memorandum pindah milik yang kosong. Oleh kerana tidak menerima baki harga belian, mereka telah membaut siasatan dan mendapati bahawa firma defendan ketiga telah menyediakan dan menyerahkan satu gadaian pihak ketiga, yang dikatakan telah ditandatangani oleh plaintif-plaintif, yang memihak kepada bank defendan keempat untuk mendapatkan pinjaman untuk syarikat defendan kelima. Plaintif-plaintif telah memulakan satu tindakan untuk mendapat

A balik tanah mereka dengan membatalkan gadaian itu. Plaintif-plaintif berhujah bahawa bank defendan keempat merupakan pihak atau privy kepada fraud berdasarkan tindakan-tindakan dan peninggalan pegawai-pegawainya. Hakim perbicaraan mendapati bahawa defendan pertama tiada niat sebenar mendapatkan tanah itu tetapi hanya menggunakan tanah tersebut sebagai cagaran
B untuk pinjaman. Defendan kedua semestinya satu pihak kepada fraud tersebut. Firma defendan ketiga telah dikekalkan oleh bank defendan keempat untuk menyediakan dokumentar undang-undang yang perlu untuk pinjaman tersebut. Oleh itu, akibatnya di sisi undang-undang adalah bahawa defendan-defendan kedua dan ketiga dengan niat dan tujuan adalah ejen-ejen defendan keempat dalam transaksi tersebut. Namun, hakim yang bijaksana mendapati tiadak keterangan fraud
C di pihak bank defendan keempat. Hakim perbicaraan dengan itu memutuskan bahawa gadaian berdaftar bank itu tidak boleh disangkal meskipun gadaian itu diperoleh melalui alat palsu. Plaintif-plaintif telah merayu.

D **Diputuskan**, membenarkan rayuan plaintif:

(1) (oleh **Gopal Sri Ram HMR**) Mahkamah Rayuan enggan mengakas penemuan fakta oleh hakim perbicaraan yang bank defendan keempat tidak merupakan pihak atau privy kepada fraud tersebut. Pertamanya, penemuan itu adalah fakta semata-mata, berdasarkan penilaian hakim yang bijaksana tentang
E kebolehpercayaan saksi-saksinya. Mahkamah Rayuan menangguhkan pendapatnya berhubung perkata ini. Keduanya, adalah amalan tetap bahawa di mana pengadil awal fakta telah membebaskan defendan atas pertuduhan fraud, penemuan begini tidak akan dijadikan sebaliknya kecuali terdapat alasan-alasan nyata. Mahkamah Rayuan enggan memutuskan ' fraud perayu'
F di pihak defendan kecuali dalam kes-kes luar biasa. Namun, memandangkan plaintif-plaintif berhak untuk berjaya dalam rayuan tersebut berdasarkan tafsiran biasa s 340(2)(a), adlah tidak perlu juga untuk memutuskan di pihak mereka atas alasan pemaslusan (lihat perenggan 5–6, 21); *Ryan v Jarvis* [2005] UKPC 27 dan *Akerhielm v De Mare* [1959] AC 789 diikut.

G (2) (oleh **Gopal Sri Ram HMR**) Meskipun terdapat penemuan terhadap peguamcara defendan kedua dan firma defendan ketiga, hakim perbicaraan menyebelahi bank defendan keempat berkaitan tuntutan plaintif-plaintif. Beliau menerima, mengikut *Doshi*, bahawa pengetahuan defendan kedua tentang fraud itu tidak boleh dikatakan disebabkan oleh deefndan keempat
H yang bukan privy kepada fraud. Namun, *Doshi* adalah satu kes di mana mahkamah perlu menentukan sama ada pengetahuan peguamcara tentang fraud boleh dikatakan disebabkan oelh anakguamnya, dengan itu menyebabkan ketua itu bertanggungjawab dalam common law untuk fraud (dalam maksud yang luas) oleh ejen. Ia bukan kes berkaitan pencabaran hak milik di bawah s 340(2) Kanun Tanah Negara 1965 ('KTN') (lihat perenggan
I 7, 9); *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 dibeza.

(3) (oleh **Gopal Sri Ram HMR**) Seksyen 340(2)(a) KTN memberi hak kepada plaintif untuk memansuhkan hak milik atau kepentingan berdaftar dalam dua keadaan berbeza. Beliau boleh berbuat demikian dengan menunjukkan bahawa: (a) pemegang adalah pihak atau privy kepada fraud atau salah

tanggapan; atau (b) ejen pemegang adalah pihak atau privy kepada farud atau salah tanggapan itu. Seksyen 340(2)(a) tidak menghendaki pemegang hak milik atau kepentingan berdaftar itu sendiri mestilah mempunyai pengetahuan atau pemerhatian (sebenar atau dikaitkan) tentang fraud ehen atau yang mana beliau telah mengarahkan fraud itu dilaksanakan (lihat perenggan 12); *United Overseas Finance Ltd v Victor Sakayamary* [1997] 3 SLR 211 diikut.

(4) (oleh **Gopal Sri Ram HMR**) Berdasarkan perkataan nyata s 340(2)(a) KTN hakim perbicaraan yang bijaksana telah mengemukakan soalan yang salah. Setelah yakin bahawa defendan keempat bukan pihak atau privy kepada fraud, beliau tetap memutuskan bahawa defendan kedua adalah pihak kepada fraud dan/atau salah tanggapan dan juga bahawa defendan-defendan kedua dan ketiga adalah ejen-ejen defendan keempat dalam transaksi itu. Hakim perbicaraan telah gagal untuk seterusnya menimbangkan kesan fraud ejen-ejen tersebut ke atas transaksi itu,berdasarkan perkataan-perkataan nyata s 340(2)(a) KTN. Fraud defendan kedua sebagai ejen kepada bank defendan keempat menyebabkan gadaian berdaftar itu boleh disangkal. Plaintif-plaintif berhak untuk berjaya atas alasan ini sahaja (lihat perenggan 13–14).

(5) (oleh **Gopal Sri Ram HMR**) Bahkan, s 340(3)(a) dan (b) menggunakan perkataan 'subsequently' yang bermaksud bahawa di mana tuanpunya berdaftar memasuki buku daftar dengan apa cara yang telah ditetapkan dalam s 340(2), dan 'subsequently' memindahkan tanah itu kepada yang lain, hak milik yang lain itu juga boleh disangkal kecuali pindah milik berikutan itu dibuat kepada pembeli yang berniat baik dan memberikan balasan yang bernilai. Mereka yang membeli daripada pembeli sedemikian juga dilindungi (lihat perenggan 18).

(6) (oleh **Gopal Sri Ram HMR**) Defendan keempat bukan pembeli bona fide yang dilindungi oleh proviso kepada s 340(3) KTN kerana 'a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not' (lihat perenggan 14); diikut. Beban untuk membuktikan bahawa seseorang itu adalah pembeli berniat baik dan memberikan balasan bernilai terletak ke atas seseorang yang menyatakannya. Dalam kes ini defendan keempat tidak berbuat sedemikian. Oleh itu kes ini tidak terangkum di bawah proviso kepada s 340(3) (lihat perenggan 15); *Bhup Narain Singh v Gokhul Chand Mahton* LR 61 IA 115; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320 dirujuk.

(7) (oleh **Gopal Sri Ram HMR**) Alat yang mana gadaian terbentuk adalah palsu. Hakim perbicaraan adalah betul apabila memutuskan keputusan terikat dengan *Adorna Properties*. Namun, mahkamah ini telah menetapkan alasan kenapa penghakiman Mahkamah Persekutuan dalam kes *Adorna Properties* perlu diambilkira (lihat perenggan 16); *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241 tidak diikut dan *Subramaniam v Sandrakasan* [2005] 6 MLJ 120 diikut.

(8) (oleh **Gopal Sri Ram HMR**) *Adorna Properties* tidak membuktikan prinsip common law berdasarkan polisi yang dipertimbangkan seperti dalam kes *Donoughue v Stevenson* [1932] AC 562. Ia hanya suatu kes yang melibatkan

penafsiran peruntukan dalam statut, iaitu s 340 KTN. *Adorna Properties* diputuskan tanpa mengambilkira peruntukan lain dalam KTN dan tanpa rujukan kepada *M & J Frozen Foods*, satu keputusan Mahkamah Agong sebelumnya yang memutuskan bahawa KTN membentuk keadaan yang tak boleh disangkal yang tertunda dan tidak segera. Oleh itu *Adorna Properties* dianggap per incuriam dan tidak mengikat ke aats mahkamah bawahan (lihat perenggan 19–20); *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 dirujuk dan *Subramaniam v Sandrakasan* [2005] 6 MLJ 120 diikut.

(9) (per **Raus Sharif HMR**) Setelah memutuskan bahawa defendan kedua bukan privy atau pihak kepada fraud itu dan seterusnya memutuskan bahawa defendan-defendan kedua dan ketiga mempunyai niat dan tujuan menjadi ejen-ejen defendan keempat, hakim perbicaraan sepatutnya telah memutuskan menyebelahi plaintif-plaintif berdasarkan alasan berkaitan s 340(2)(a) KTN. Hakim perbicaraan adalah salah untuk memutuskan bahawa pengetahuan defendan kedua tentang fraud tidak boleh dikatakan telah disebabkan oleh defendan keempat (lihat perenggan 80).

(10) (per **Raus Sharif HMR**) Seksyen 340(2)(a) KTN dengan jelas memperuntukkan bahawa hak milik seorang tuanpunya dimansuhkan atas alasan fraud atau pemalsuan yang mana tuanpunya atau ejennya adalah satu pihak. Di sini defendan-defendan kedua dan ketiga, seperti yang didapati oleh hakim perbicaraan, merupakan defendan keempat dan defendan kedua adalah pihak kepada fraud tersebut. Oleh itu gadaian berdaftar yang menyebelahi defendan keempat tidak sah dan tak boleh disangkal. Keputusan hakim perbicaraan adalah berdasarkan kesilapan membaca keputusan dalam *Doshi*. *Doshi* tidak boleh digunapakai apabila mentafsir s 340(2) KTN (lihat perenggan 81).

(11) (per **Low Hop Bing HMR** menentang) Persoalan yang perlu diputuskan dalam rayuan ini boleh diungkapkan: 'Where a borrower retains solicitors to prepare and present documents as security for a loan granted by a bank, and the borrower pays the fees and costs for the solicitors' service, are the solicitors the agents of the bank?' Sebagai perbandingan persoalan sebenar dalam *Lee Yoke Chye* adalah sama ada, apabila seorang peguamcara menerima keluaran dokumen hak milik, beliau menerimanya sebagai 'pemegang amanah harta' atau sebagai 'ejen' untuk pembeli yang mengekalkannya untuk bertindak dalam pembelian tanah itu? Ia diputuskan dalam *Lee Yoke Chye* bahawa peguamcara telah memegang dokumen hak milik sebagai ejen untuk mereka yang mengekalkan firma peguamcara itu, pembeli tersebut. Memandangkan peguamcara defendan ketiga dikekalkan oleh syarikat defendan kelima, membayar yuran dan kos untuk khidmat guaman, peguamcara defendan ketiga pada masa matan, dari segi undang-undang dan fakta, adalah ejen syarikat defendan kelima (lihat perenggan 46–49); *Lee Yoke Chye v Toh Thiam Hock & Co* [1987] 1 MLJ 122 dibeza.

(12) (per **Low Hop Bing HMR** menentang) Bahkan s 3 Akta Profesyen Undang-Undang 1976 mentafsirkan 'anakguam' sebagai termasuklah, berkaitan urusan yang tiada perbalahan, seseorang, yang sebagai seorang prinsipal, mengekalkan atau melantik seorang peguambela dan peguamcara,

dan sesiapa untuk masa itu adalah bertanggungjawab membayar peguambela dan peguamcara untuk khidmat dan kosnya. Di sini, dokumen-dokumen gadaian yang disediakan dan dikemukakan terangkum dalam skop 'urusan yang tiada perbalahan' yang mana defendan kelima telah mengekalkan firma peguamcara defendan ketiga. Retainer yang diperuntukkan untuk hubungan kontraktual antara defendan kelima dan peguamcara defendan ketiga. Oleh itu, pengetahuan tentang fraud dan/atau salah tanggapan peguamcara tidak boleh dikatakan telah disebabkan oleh bank defendan keempat. Gadaian tersebut adalah sah dan tak boleh disangkal. Alasan untuk mengekalkan kesahan dan sifat tak boleh sangkal gadaian berdaftar adalah berbeza daripada yang dihadapkan kepada hakim perbicaraan yang bijaksana, tetapi kesannya adalah sama (lihat perenggan 51, 53, 56 & 59).]

Notes

For a case on jurisdiction of the Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1693.

For cases on forged charges, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2921–2922.

For cases on forged transfers, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2923–2928.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241 (not folld)

Akerhielm v De Mare [1959] AC 789 (folld)

Bhup Narain Singh v Gokhul Chand Mahton LR 61 IA 115 (refd)

Donoughue v Stevenson [1932] AC 562 (refd)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (distd)

Keith Sellar v Lee Kwang [1980] 2 MLJ 191 (refd)

Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320 (refd)

Lee Yoke Chye v Toh Theam Bock & Co [1987] 1 MLJ 122 (distd)

Lloyd v Grace, Smith & Co [1912] AC 716 (folld)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 (refd)

Ryan v Jarvis [2005] UKPC 27 (folld)

Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy& Ors [2005] 6 MLJ 120 (folld)

United Overseas Finance Ltd v Victor Sakayamary [1997] 3 SLR 211 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 69(1)
Legal Profession Act 1976, s 3
National Land Code 1965 s 340(1), (2)(a), (3)
Rules of the Court of Appeal 1994 r 5
Land Titles Act [Sing] s 46(2)(a)

Appeal from: Civil Appeal No S3–22–868 of 1999 (High Court, Kuala Lumpur)

Jerald Gomez (David Peter with him) (Jerald Gomez & Associates) for the appellants in Civil Appeal No W–02–746 of 2005.

Ahmad Badri Idris (Ram Reza & Muhammad) for the first respondent in Civil Appeal No W–02–746 of 2005.

Abdul Aziz (Nasira Aziz & Co) for the second and third respondents in Civil Appeal No W–02–746 of 2005.

Oommen Koshy (Mohamed Ismail & Co) for the fourth respondent in Civil Appeal No W–02–758 of 2005.

Abdul Aziz (Nasira Aziz & Co) for the appellants in Civil Appeal No W–02–746 of 2005.

Jerald Gomez (David Peter with him) (Jerald Gomez & Associates) for the first and second respondents in Civil Appeal No W–02–746 of 2005.

Oommen Koshy (Mohamed Ismail & Co) for the third respondent in Civil Appeal No W–02–746 of 2005.

Abdul Aziz bin Hamzah (Zamani Ibrahim Tarmizan & Co) for the appellant in Civil Appeal No W–02–790 of 2005.

Jerald Gomez (David Peter with him) (Jerald Gomez & Associates) for the first and second respondents in Civil Appeal No W–02–790 of 2005.

Oommen Koshy (Mohamed Ismail & Co) for the third respondent in Civil Appeal No W–02–790 of 2005.

Abdul Aziz bin Hamzah (Zamani Ibrahim Tarmizan & Co) for the appellant in Civil Appeal No W–02–804 of 2005.

Jerald Gomez (David Peter with him) (Jerald Gomez & Associates) for the first and second respondents in Civil Appeal No W–02–804 of 2005.

Oommen Koshy (Mohamed Ismail & Co) for the third respondent in Civil Appeal No W–02–804 of 2005.

Oommen Koshy (Mohamed Ismail & Co) for the appellant in Civil Appeal No W–02–395 of 2006.

Jerald Gomez (David Peter with him) (Jerald Gomez & Associates) for the respondents in Civil Appeal No W–02–395 of 2006.

Gopal Sri Ram JCA:

[1] This is yet another occasion when we are compelled to decide as to which of two innocent persons who are affected by the fraud of a rogue third party must suffer. In the present case the question arises in the context of immovable property and is clearly determined by statute, namely, the National Land Code ('the Code'). The relevant facts are as follows.

[2] Ismail bin Mohamad ('Ismail') and his wife Sadiah were the registered proprietors of three lots of land. I will, for convenience, refer to these in this judgment as the subject property. Ismail and Sadiah wanted to sell the subject property. On 30 July 1999 they entered into a written agreement with the first defendant. The purchase price was to be RM7.5m. The written agreement was prepared by the second defendant, an advocate and solicitor. It provided, among other things, that the first defendant was to make two initial payments of

RM150,000 and RM50,000 to Ismail and Sadiah. The balance of RM7.3m was to be paid to the third defendant firm of advocates and solicitors of which the second defendant was a partner. The initial payments were made. Ismail and Sadiah then deposited the title deeds to the subject property together with signed memoranda of transfers in blank with the third defendant firm. Having heard nothing about the balance receivable by them, they made inquiries. They then discovered to their utter shock and dismay that the subject property had been charged to the fourth defendant to secure a loan of RM16m in favour of the fifth defendant and that a sum of RM10m had been disbursed to the latter. There is no doubt – and this is the finding of the learned trial judge — that the instrument of charge and other accompanying documents had been forged and that the first and second defendants had perpetrated a fraud upon Ismail and Sadiah. To quote the trial judge:

> In the present case a sum of RM10m had already been disbursed to the fifth defendant and not a single payment had been made by the fifth defendant to the fourth defendant. According to first defendant, the manager of the fifth defendant (Wong Kim Leng), had absconded with the money to China.
>
> On the evidence before me, I agree with the plaintiffs' contention that the second defendant is not just privy to the fraud and/misrepresentation but was a central figure, in planning the whole scheme with the first defendant and the representatives of the fifth defendant. It is common ground that the third defendant, the firm of solicitors, was retained by the fourth defendant to prepare the necessary legal documentation for the loan, therefore, the legal consequence is that the second and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction.

[3] In a later passage in his judgment the learned judge made this further observation:

> Therefore, from the evidence it is pretty obvious that the first defendant had entered into the sale and purchase agreement not with the genuine intention of acquiring the said lands but merely to use the said lands as security for a loan to be obtained from a financial institution. I am satisfied that all these were done not only with the knowledge of second defendant but with his full cooperation. The transaction could not have gone through without the second defendant's cooperation. Both the charge and the charge annexure emanated from the second defendant's office and presumably the forgery must have originated from there as well. Even though there is no clear evidence as to who actually forged the plaintiffs' signatures on the charge and the charge annexure, but one thing is clear it could not have been done without the second defendant's knowledge or connivance. It is, therefore, not unreasonable to assert that second defendant was not just privy to the fraud and/misrepresentation, but he was in fact a party to the fraud and/or misrepresentation.

[4] To resume the narrative, Ismail and Sadiah then brought an action against five defendants to recover the subject property. Some time after the commencement of the action Ismail died and the instant plaintiffs are his personal representative and Sadiah. For convenience I will, hereafter in this judgement refer to them as the plaintiffs. It is part of the plaintiffs' case that the fourth defendant lender was also party or privy to the fraud because of the acts and omissions of one of its officers. The learned judge having very carefully scrutinised the evidence negatived any fraud

A on the part of the fourth defendant lender. In this appeal, the plaintiffs have invited this court to reverse this finding. I find myself unable to accept this invitation for two reasons.

[5] In the first place, the finding that there was no fraud on the part of the fourth B defendant is one of pure fact based on the learned judge's assessment of the credibility of witnesses. In accordance with well settled principles, this court will defer to his views on the point. As Lord Hoffmann said when delivering the Advice of the Board of the Privy Council in *Ryan v Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda:

C

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

D So too here.

[6] The second reason why I am not prepared to depart from the views of the judge on the point is this. It is the settled practice of this court that in such a case as this — where the primary trier of fact has acquitted a defendant on a charge of fraud — E not to reverse such a finding save on clearest grounds. It must be an exceptional case. In other words, this court is most reluctant to find what lawyers call 'appellate fraud' on the part of a defendant. And I need do no more than to quote from the advice of the Privy Council delivered by Lord Jenkins in *Akerhielm v De Mare* [1959] AC 789:

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> Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of the judge at first instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [1927] AC 37; *Watt (or Thomas) v Thomas* [1947] AC 484; *Yuill v Yuill* G [1945] P 15; *Benmax v Austin Motor Co Ltd* [1955] AC 370). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal H except on the clearest grounds (see *Glasier v Rolls* [1889] 42 Ch D 436, 457).

[7] Returning to the mainstream, despite the damming findings he made against the second and third defendants which I have quoted above, the learned judge found for the fourth defendant lender in respect of the plaintiffs' claim against it. He made I this finding by accepting a submission to the effect that the second defendant's knowledge of the fraud could not be imputed to the fourth defendant. The learned judge's conclusion on this part of the case was largely if not entirely based on the decision of the former Federal Court in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85. It therefore becomes necessary to undertake a careful examination of that case.

[8] In *Doshi*, the facts were these. The defendant, Doshi, was the former registered proprietor of certain premises. He obtained a loan of $130,000 from one Chooi. As security for the repayment of the loan he deposited the title deed to the premises and another land with the lender. He also deposited two duly executed blank transfer forms with Chooi. The defendant failed to repay the said loan. So, Chooi transferred the premises to a company called Equitable Nominees Sendirian Berhad for a consideration of $100,000. Later, Equitable Nominees sold and transferred the land to the plaintiff who paid 10% of the purchase price and charged the premises to Equitable Nominees to secure payment of the balance of the purchase price. The plaintiff as registered proprietor then served a notice on the defendant to quit and deliver possession of the premises. The defendant having failed to comply with the demand, the plaintiff brought an action for recovery of possession and moved for summary judgment for vacant possession. The defendant opposed the application on a number of grounds which he claimed were triable issues. One of these was that as Chooi was the plaintiff's solicitor, his knowledge of the previous transaction which Chooi had entered into with the defendant was to be imputed to the plaintiff. The High Court entered summary judgment and the defendant appealed. The Federal Court dismissed the appeal.

[9] You will see at once that *Doshi* was not a case concerning an impeachment of title under s 340(2)(a) of the 'the Code'. It was a case in which the court had to determine whether Chooi's knowledge could be imputed to the plaintiff and thereby render the plaintiff liable at common law for any fraud (in the widest sense) by Chooi upon the plaintiff so as to raise a bona fide triable issue in the context of an O 14 application. It was in that very limited context that Gill CJ made the following statement:

> Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. Thus in *Rolland v Hart* (1870) Ch App 678, 681, which was followed by the High Court of Australia in *Stuart v Kingston* (1923) 32 CLR 309, Lord Hatherley LC said:
>
> > Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.
>
> In *Bradley v Riches* (1878) 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.
>
> There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd Ed) Vol 14, para 1019 at p 543) as follows:
>
> > Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

> It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then *his entering into an agreement to purchase the premises was tantamount to fraud.*
>
> It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v Le Neve* (1747) Amb 436; 26 ER 1172. But the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration (see 14 *Halsbury* (3rd Ed) para 1023 at p 545). Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine. (Emphasis added.)

(See 14 *Halsbury*, (3rd Ed) para 1022 at p 545).

[10] The learned judge, after quoting the foregoing passage in the judgment of the Chief Justice of Malaya went on to say as follows:

> Likewise in the present case knowledge of second defendant could not appropriately be imputed to the fourth defendant who was not privy to the fraud. The doctrine of constructive notice clearly is inapplicable to the facts in the present case.

[11] With respect, I am unable to agree with this reasoning of the learned judge. Section 340(2)(a) of the Code says this:

> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;

[12] It is to be noted that when carefully read, s 340(2)(a) entitles a plaintiff to defeat the title of a registered proprietor — or a registered chargee as in the present instance — in two very distinct circumstances. He or she may, in the first place, succeed by showing that the registered proprietor was a party or privy to the fraud in a given case. Assuming a plaintiff cannot show this he or she is not out of court. For, he or she may, in the second place, succeed by showing that the registered proprietor's agent was party or privy to the fraud or misrepresentation in question. The section does not require that the registered proprietor must have knowledge or notice of the agent's fraud or authorise the commission of it. I would here very respectfully adopt as my own, the words of GP Selvam J in *United Overseas Finance Ltd v Victor Sakayamary* [1997] 3 SLR 211, uttered when considering the equipollent provision s 46(2)(a) of the Singapore Land Titles Act (Cap 157, 1994 Ed):

> Aside from that, the rule enunciated in *Halsbury's Laws of England* and applied in *Doshi v Yeo Tiong Lay*, in my view, does not apply in the context of s 38(2)(a) (now s 46(2)(a)) of the Act because the section in clear language abrogates the restricted rule as regards the agent's fraud. It expressly provides that the title of a proprietor may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party or in which he

or his agent colluded. The section places no restriction that the wrongful act must be authorized by the principal. There is a simple rationale for this rule: a proprietor when he asserts a right, title or interest, as distinct from when he seeks to avoid a liability, founds his claim on the acts done and knowledge acquired by his solicitor or other agent. If the solicitor or agent has acted fraudulently the proprietor inevitably will found his action on, and benefit by, the fraud of his solicitor or agent. The law cannot allow the proprietor such benefit as he appointed the agent and he is bound by his agents' acts and knowledge. It would be an affront to common sense to hold that the proprietor can acquire an indefeasible title because the fraud or illegality was not that of the proprietor but his agent. The Federal Court, in my respectful view, without justification, ignored words to the same effect in the Malaysian Land Code. *Assets Co Ltd v Mere Roihi* 1905 AC 176 which was referred to by the Federal Court expressly recognized that fraud of an agent would defeat the title of the principal. (Emphasis added.)

[13] Hence, in my respectful view, having regard to the express wording of s 340(2)(a) of the Code the learned judge asked himself the wrong question. In the passage already quoted from his judgment, he merely satisfied himself that the fourth defendant was neither a party nor privy to the fraud. But he failed to go on and consider the agent's fraud. He had held that — to quote him — 'the second and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction'. And he had also held — to quote him once again — 'that second defendant was not just privy to the fraud and/or misrepresentation, but he was in fact a party to the fraud and/or misrepresentation'. It was therefore incumbent for the learned judge to apply the clear words of s 340(2)(a) to the facts as found by him. Had he done so he would have concluded that the fraud of the second defendant as agent of the fourth defendant rendered defeasible the registered charge in the latter's hands. To emphasise the point I seek to make, the learned judge, with respect, erred in law in confining himself to the position at common law without hearkening to the express words of the Code. Had he directed himself correctly on the law, he would have held for the plaintiffs.

[14] Accordingly, in my judgment the plaintiffs are entitled to succeed on this ground alone. No question arises on this part of the case as to whether the fourth defendant is a bona fide purchaser who is protected by the proviso to s 340(3) of the Code and I therefore find it unnecessary to consider the effect, if any, of the proviso. In any event, even if the proviso is applicable to the fourth defendant (which I do not think to be the case), the fourth defendant is not a bona fide purchaser because it is bound by the acts of its agent. The law on the point has been clearly set out in *Lloyd v Grace, Smith & Co* [1912] AC 716 which is authority for the proposition 'that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not': *Keith Sellar v Lee Kwang* [1980] 2 MLJ 191, per Hahim Yeop Sani J, (as he then was). And to quote once again from the judgment of GP Selvam J in *United Overseas Finance Ltd v Victor Sakayamary*:

In my view the above statement in *Halsbury's Laws of England* [referred to *Doshi*] does not apply if the facts can be brought within the rule in Lloyd v Grace Smith & Co [1912] AC 716, *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, *Navarro v Moregrand Ltd* [1951] 2 TLR 674 and *United Overseas Finance Ltd v Yew Siew Kien* [1993] 3 SLR 207. The rule is that a principal is responsible for the wrongs his agent has done in

A the course of his employment — that is in the course of conducting the business entrusted to him. Phrases such as 'acting in the course of his employment' or 'acting within the scope of his agency' must be construed liberally — per Lord Macnaghten in *Lloyd v Grace Smith & Co* at p 736.

B **[15]** Further, on the facts, the fourth defendant has certainly not even tried to discharge the burden on it to demonstrate that it is a bona fide purchaser. As such the facts of the present case do not fall within the proviso to s 340(3).

[16] There is another ground on which the plaintiffs' appeal has been argued. It is
C said that the instrument by which the charge was created being a forgery as expressly found by the learned trial judge, the fourth defendant takes no title. The learned judge quite correctly treated himself bound on this part of the case by the decision of the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241. In that case the Federal Court held that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him falls
D within a category of registered proprietors who obtain immediate indefeasibility notwithstanding that they acquired their title under a forged instrument. I have in *Subramaniam v Sandrakasan* [2005] 6 MLJ 120 set out the reasons why the Federal Court's judgment in *Adorna Properties* must be disregarded. I need add only one further comment to what I have already there said.

E

[17] Section 340(3) tells us what happens to the title of a registered proprietor who has acquired it, inter alia, by means of fraud, forgery or an insufficient or void instrument. And this is how it puts it:

F (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

G (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

H

[18] Note that sub-s (3) in paras (a) and (b) employs the word 'subsequently'. What it means is this. If a registered proprietor gets on the register by any of the means set out in s 340(2), and if he or she to use the expression housed in the Code — subsequently — transfers his or her land to another, the title of that other is also
I defeasible unless he or she is a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it. See, *Bhup Narain Singh v Gokhul Chand Mahton* LR 61 IA 115; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320.

[19] Since writing this judgment in draft, I have had the advantage of reading the valuable concurrence of my learned brother Raus Sharif JCA. I understand and appreciate my learned brother's reluctance to depart from *Adorna Properties* as it is a decision of the Federal Court. I would have joined in his view had *Adorna Properties* declared a principle of the common law based on policy considerations as was the case of *Donoughue v Stevenson* [1932] AC 562. But *Adorna Properties* is not such a case. It is a case involving the interpretation of a provision in a statute, namely, s 340 of the Code which I have demonstrated in *Subramaniam v Sandrakasan* to have been done without having regard to another provision in the Code and without reference to the decision of the Supreme Court in *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 which held that the Code creates deferred and not immediate indefeasibility.

[20] As such, in impugning the decision in *Adorna Properties*, I would take refuge in the following words of the great jurist Sir John Salmond in his *Treatise on Jurisprudence* (12th Ed) at pp 151–152:

> A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v LCC* (1898) AC 375) and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court (*Young v Bristol Aeroplane Co Ltd* (194) KR at p 729 (CA)) The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. *Even a lower court can impugn a precedent on such grounds*. (Emphasis added.)

[21] Since I have come to the conclusion that the plaintiffs are entitled to succeed in this appeal on a plain interpretation of s 340(2)(a), it makes it unnecessary to also rule in their favour on the forgery ground.

[22] For the reasons already given, I would allow the appeal and set aside the order of the High Court dismissing the plaintiff's claim against the fourth defendant. The plaintiff shall be entitled to a declaration that the charge vide Presentation No 1084/99 Jilid 62 Folio 61 dated 20 September 1999 over the property known as GM 186 Lot 1334, GM 187 Lot 1335 and GM 173 Lot 1336 all in Mukim 15, District of Seberang Prai Selatan, Negeri Pulau Pinang and the annexure, to same is null and void and of no effect. There shall also be a consequential order that the relevant register and the issue documents of title be rectified by the deletion of the memorial of the fourth defendant's charge. The fourth defendant shall bear the costs of this appeal. I would also vary the learned judge's order on costs by requiring the fourth defendant to pay the plaintiff's costs in the court below and to recover the same from the other defendants. The deposit shall be refunded to the plaintiffs.

[23] One final word. When we sat on 19 September 2006, five appeals were called on. Of these two were withdrawn. The second defendant appealed against the orders made against him but did not appear at the hearing. Accordingly, I would dismiss his appeal with costs and direct the deposit in his case be paid out to the plaintiffs.

A In respect of the appeal by the firm of solicitors, the third defendant, I would dismiss it with costs to be paid to the fourth defendant as their appeal is directed against that defendant. The deposit in court shall be paid out to the fourth defendant. The fourth defendant's appeal is against the learned judge's order staying the effect of his judgment. In view of the orders I have proposed in the previous paragraph, I would B dismiss that appeal and make no order as to costs. The deposit in that appeal shall be refunded to the fourth defendant.

Low Hop Bing JCA:

C APPEALS

[24] Out of the multiple appeals herein, two were withdrawn on the date of hearing on 19 September 2006.

D

[25] The other appeals, against the orders of the learned trial judge made on 25 June 2005, may be tabulated as follows:

	Appellant	Order appealed against
E (1)	The plaintiffs against the fourth defendant (or interchangeably, 'the chargee bank').	The indefeasibility of the chargee bank's interest as a registered chargee.
(2)	The second defendant (who was absent at the hearing); and the third defendant, a firm of solicitors ('the solicitors'), against the chargee bank.	Restitution for the loss, and also general, aggravated and exemplary damages suffered by the plaintiffs.
F (3)	The chargee bank	Staying of the effect of the judgment.

Arguments were heard on 19 and 20 September 2006, and judgment was reserved.

G FACTUAL BACKGROUND

[26] The plaintiffs, husband and wife, were the registered proprietors of three pieces of land in the district of Seberang Perai Selatan, state of Pulau Pinang (collectively, 'the land'). The first plaintiff had since passed away and had been duly H substituted by his son, Abu Bakar bin Ismail, by order of court dated 28 September 2004.

[27] The plaintiffs had entered into a sale and purchase agreement dated 30 July 1999 ('SPA1') whereby the plaintiffs agreed to sell and the first defendant agreed to I purchase the land for a total consideration of RM7.5m. SPA1 was prepared by Abdul Aziz bin Ahmad (the second defendant) an advocate and solicitor practising under the solicitors' name of Sajali & Aziz, the third defendant, with whom the plaintiffs had deposited the relevant title deeds and the memoranda of transfer signed in blank. The chargee bank was neither a party nor privy to SPA1.

[28] Pursuant to SPA1, a sum of RM150,000 payable on the date of execution and a further sum of RM50,000 payable within one month thereof had been paid by the first defendant to the plaintiffs while the balance sum of RM7.3m, payable within three months thereof, remained unpaid. A

[29] On 9 August 1999, the first defendant entered into a sale and purchase agreement ('SPA2') to sell the land to the fifth defendant for RM26.5m. SPA2 was again prepared by the second defendant practising under the solicitors' name. The chargee bank was also neither a party nor privy to SPA2. B

[30] The chargee bank had earlier on, vide letter dated 26 July 1999, approved to the fifth defendant a term loan facility of RM16m to purchase machinery (RM6m) and working capital (RM10m) (collectively 'the loan facility'). The land (the titles to which had earlier been deposited by the plaintiffs with the solicitors) was to be used as security thereof by way of third party charge. For this purpose, the fifth defendant has applied to the chargee bank for approval to retain the solicitors as the fifth defendant's solicitors to prepare and present the charge documents and the chargee bank has duly approved the fifth defendant's said application. C D

[31] Vide the chargee bank's letter dated 4 August 1999, the solicitors were requested to prepare the charge documents with all fees and costs to be paid by the fifth defendant. E

[32] The charge documents were prepared for the fifth defendant by the second defendant practising in the solicitors' firm. For the solicitors' service, the fifth defendant has paid all the fees and costs to the solicitors.

F

[33] After the preparation of the charge documents and attendance to the execution thereof, the solicitors by letter dated 20 September 1999 requested the chargee bank to release the loan facility to the solicitors as stakeholders.

[34] Vide letter dated 21 September 1999, the fifth defendant requested the chargee bank to disburse to the fifth defendant a sum of RM10m being part of the loan facility, which the chargee bank did. G

[35] Subsequently, the plaintiffs discovered that the land had been registered and charged to the chargee bank as security for the loan facility granted to the fifth defendant. H

[36] The plaintiffs' claim that their signatures on the charge documents were forged had been verified by the Government Chemist (SP2) who after an examination and analysis of the impugned signatures thereon confirmed in his report that the signatures thereon were of different authorship from the specimen signatures of the plaintiffs. I

[37] The plaintiffs further alleged that the charge came about as a result inter alia of the fraud and/or misrepresentation committed on the plaintiffs by the first and the

second defendants. The second defendant in the solicitors' firm was a central figure in planning the whole scheme of fraud and/or misrepresentation.

[38] The plaintiffs' statement of claim had never pleaded any fraud and/or misrepresentation on the part of the chargee bank, neither was there any such evidence against it.

[39] For the sum of RM10m already disbursed to the fifth defendant, no repayment whatsoever had been made by the fifth defendant to the chargee bank.

[40] Lengthy submissions and arguments were advanced for the parties herein. However, I shall consider the core issue which in my view would determine the outcome of these appeals.

WHOSE AGENTS ARE THE SOLICITORS?

[41] It was submitted by learned counsel Mr Jerald Gomez (Mr David Peter with him) for the plaintiffs that in the preparation and presentation of the charge documents for the land to be used as security for the loan facility in favour of the fifth defendant, the solicitors were at the material time the chargee bank's solicitors and agents. *Lee Yoke Chye v Toh Thiam Hock & Co* [1987] 1 MLJ. 122 (SC) was cited in support of this contention.

[42] It response, the chargee bank's learned counsel Mr Oommen Koshy argued that the solicitors were the fifth defendant's solicitors and agents.

[43] The relevant passage of the learned trial judge's judgment reads as follows:

> It is common ground that the third defendant, the firm of solicitors, was retained by the fourth defendant to prepare the necessary legal documentation for the loan, therefore, the legal consequence is that the second and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction.

[44] From the above submissions of learned counsel and the passage in the judgment of the learned trial judge, I find that what was otherwise a common ground has now become a contentious issue in this appeal.

[45] In my judgment, under s 69(1) of the Courts of Judicature Act 1964, and r 5 of the Rules of the Court of Appeal 1994, it is trite law that appeals to the Court of Appeal shall be by way of re-hearing. In this regard, the core issue which this court has to re-hear and determine is this:

> Where the fifth defendant has retained the solicitors for the preparation and presentation of the charge documents by way of security for the loan facility granted by the chargee bank to the fifth defendant, and the fifth defendant has made payment to the solicitors of the fees and costs for the solicitors' said service, were the solicitors the agents of the chargee bank?

[46] At this juncture, for purposes of completeness, it is appropriate for me to consider *Lee Yoke Chye*, cited for the plaintiffs. There, the real issue before the then Supreme Court was:

> When the respondent firm of solicitors received the issue document of title, did the solicitors receive it as 'stakeholder' or as 'agent' for the appellant who has retained the respondent to act for her in the purchase of a parcel of land?

[47] Seah SCJ (as he then was) held that the respondent was holding the issue document of title as an agent for the appellant (purchaser) ie the person who has retained the respondent firm of solicitors.

[48] In relation to the preparation and presentation of the charge documents in this appeal, since the fifth defendant has retained the solicitors to whom the fifth defendant had paid the fees and costs for the solicitors' service, I am of the view that the solicitors were at the material time in law and in fact the agents of the fifth defendant.

[49] In other words, the fifth defendant was the client and hence the principal of the solicitors.

[50] Section 3 of the Legal Profession Act 1976, where relevant, defines the word 'client' as including, in relation to non-contentious business, any person, who as a principal, retains or employs an advocate and solicitor, and any person for the time being liable to pay an advocate and solicitor for his service and costs.

[51] 'Contentious business' is defined in s 3 as meaning business done by an advocate and solicitor in or for the purpose of proceedings begun before a court of justice, tribunal, board, commission, council, statutory body or arbitrator.

[52] In this appeal, the preparation and presentation of the charge documents did not involve proceedings before a court etc. That business comes within the ambit of 'non-contentious business' in which the fifth defendant has retained, and so is the principal of, the solicitors. The retainer provides for the contractual relationship between the fifth defendant and the solicitors.

[53] Under s 3, even a person for the time being liable to pay an advocate and solicitor for his service and costs is included in the definition of a client. A fortiori, in the instant appeal, as the fifth defendant had paid the fees and costs for the solicitors' service, the fifth defendant is most certainly the client and principal of the solicitors.

[54] On the other hand, the chargee bank was neither the person liable to pay nor has it ever paid the solicitors for their service and costs in the preparation and presentation of the charge documents. Hence, the chargee bank cannot be a client and principal of the solicitors.

[55] Both in law and in fact, I am of the view that the answer to the core issue for determination in this appeal is in the negative ie the solicitors were not the agents of the chargee bank, but the agents of the fifth defendant. Consequently, the knowledge of the solicitors' fraud and/or misrepresentation cannot be imputed to the chargee bank.

[56] Section 340(1) of the National Land Code 1965 where relevant provides for the chargee bank's indefeasible interest as a registered chargee as follows:

> 340 Registration to confer indefeasible... interest, except certain circumstances.
>
> (1) The... interest of any person or body in whose name any charge is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

[57] As the pleadings and evidence revealed that the chargee bank was neither a party nor privy to the fraud or misrepresentation, and that the party or parties who had perpetrated the fraud or misrepresentation were not the agents of the chargee bank, the indefeasibility of the chargee bank's interest which has been registered as a charge remains unaffected by the circumstances set out in s 340(2). For ease of reference, those circumstances where relevant merit reproduction as follows:

> 340(2) The... interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation in which the person or body, or any agent of the person or body, was a party or privy;

That being the case, the chargee bank's interest registered as such cannot be set aside under s 340(3).

[58] I therefore hold that the charge registered in favour of the chargee bank is valid and indefeasible. In doing so, I must immediately emphasize that my grounds for sustaining the validity and indefeasibility of the registered charge are different from those of the learned trial judge, but the result is the same.

PLEADINGS

[59] Having had the opportunity of reading the draft judgment of my learned brother Gopal Sri Ram JCA, I am constrained to say that with the utmost respect, I am unable to agree. I have therefore prepared and sent a separate draft judgment to my learned brothers, Gopal Sri Ram and Raus Sharif JJCA, for their comments.

[60] I have also had the opportunity of reading the draft judgment of my learned brother Raus Sharif JCA in response to my draft judgment. In relation to the parties' pleadings, his Lordship held that 'the issue that the second and third defendants were not the agents of the fourth defendant, but the agents of the fifth defendant, was not part of the fourth defendant's case before the learned trial judge. It was never pleaded in the fourth defendant's statement of defence.'

[61] With the utmost respect, it is incumbent upon me to refer to the plaintiffs' amended statement of claim and then the statement of defence of the second and third defendants, and finally the statement of defence of the fourth defendant, for the purpose of putting the pleadings in proper perspective.

[62] The relevant averments pleaded in the plaintiffs' amended statement of claim against the defendants may be tabulated as follows:

Para	Averment pleaded
4	The second defendant, an advocate and solicitor, prepared and witnessed the relevant documents and had conduct of the loan transaction, and was a partner and/or agent of the third defendant.
5	The third defendant acted as solicitors for the loan transaction.
6	The fourth defendant is a party in whose favour a charge has been registered over the land.
11.10	The plaintiff discovered that the second and third defendants have in collusion with the first defendant caused the plaintiffs' signatures to be forged and placed on to the charge documents and annexure, thereby creating a third party legal charge in favour of the fourth defendant as security for the loan to the fifth defendant.
16.1	The second and third defendants had placed themselves in a position of conflict of interest in that the third defendant was acting for the fourth defendant in the loan transaction.

[63] Upon reading the above averments generally; and para 16.1 specifically, I am of the view that the plaintiffs have indeed pleaded to the effect that the second and third defendants were acting for the fourth defendant in the loan transaction. Paragraph 16.1 has in turn been denied by the second and third defendants vide para 19 of their statement of defence, and by the fourth defendant vide para 18 of their statement of defence which in effect averred that the fourth defendant had no knowledge and made no admission of para 16.1 of the plaintiffs' statement of claim. I am therefore constrained to state that I am unable to agree with the aforesaid view of my learned brother Raus Sharif JCA.

EVIDENCE

[64] In relation to the evidence adduced at the trial, the draft judgment of my learned brother Raus Sharif JCA stated as follows:

> In fact the evidence adduced by the fourth defendant at the trial supported the fact that it was the fourth defendant who appointed the third defendant as the solicitor for the preparation and presentation of the charge documents.

[65] With the utmost respect, I shall refer to the relevant evidence adduced at the trial.

[66] The witness' statement tendered for the second and third defendants may be found at pp 440–453 of the appeal record. The relevant evidence of the second defendant was to the effect that the charge documents in Form 16A were executed before him.

[67] When cross-examined by learned counsel for the fourth defendant, at p 291 thereof, the second defendant testified that the third defendant, the law firm of which he was a partner, was requested to prepare the loan agreement for the fifth defendant and the fees therefor were paid by the fifth defendant.

[68] Under cross-examination by learned counsel for the plaintiffs, from pp 299–325, the second defendant confirmed that for the preparation of the loan agreement, he dealt with one En Fadzimi and one Cik Salmah Harun, both of whom were from the fourth defendant, and that he was acting for the fourth defendant. It is significant to note that he also testified that at the material time, he was acting for the first defendant and the fifth defendant in the various agreements in connection with the loan transaction.

[69] In the witness' statement, SD4 Marsinah bte Arshad, an assistant manager of the fourth defendant, testified that the fifth defendant was the applicant for the loan from the fourth defendant and that the third defendant had been appointed to perfect the loan documentation.

[70] The relevant portion of the witness' statement of SD5, Salmah bte Harun, the fourth defendant's senior executive, in the form of question and answer (with my translation in English) merits reproductions follows:

9 Firma guaman mana yang dilantik untuk menyediakan dokumentasi pinjaman?

Firma Tetuan Sajali & Aziz.

(9 Which legal firm was appointed to prepare the loan documentation?

The firm Messrs Sajali & Aziz.)

10 Siapakah yang membayar fee guaman?

Pihak peminjam yang membayar kepada firma adalah juga bertindak bagi pihak peminjam iaitu Defendan Ke-5.

(10 Who paid the legal fees?

The borrower paid to the firm which also acted for the borrower ieefendant No 5.)

11 Kenapa firma Tetuan Sajali & Aziz yang dilantik?

Pihak peminjam yang memohon Tetuan Sajali & Aziz sebagai peguamcara mereka.

(11 Why was the firm Messrs Sajali & Aziz appointed?

The borrower applied for Messrs Sajali & Aziz to be their solicitors.)

12 Rujuk mukasurat 2–3 Ikatan I. Apakah dokumen ini?

Ini adalah Memo Dalaman Perlantikan Peguam Defendan Ke-4 yang disediakan oleh saya dan ditandatangani oleh pegawai-pegawai atasan saya.

(12 Refer to pp 2–3, Bundle I. What is this document?

It is Defendant No 4's Internal Memo for Appointment of Solicitors prepared by me and signed by my superior officers.)

13 Rujuk perenggan 2 pada perkataan 'Pandangan'. Apakah maksud itu?

Itu adalah pandangan saya dan jabatan saya bahawa tiada halangan untuk melantik Tetuan Sajali & Aziz sebagai peguamcara seperti yang dipohon oleh peminjam kerana Tetuan Sajali & Aziz adalah dalam panel peguam Defendan Ke-4.

(13 Refer to paragraph 2. What does it mean?

That is my and my department's view that there was no objection to appoint Messrs Sajali & Aziz to be the solicitors as applied for by the borrower because Messrs Sajali & Aziz is on the fourth defendant's panel of solicitors.)

14 Bilakah perlantikan Tetutan Sajali & Aziz diluluskan oleh Defendan Ke-4?

Mengikut Memo Dalaman Perlantikan Peguam, sokongan ditandatangani oleh Penolong Pengurus Besar Kredit pada 4 Ogos 1999 dan diluluskan oleh Pengurus Besar Operasi pada 05.08.1999.

(14 When was the appointment of Messrs Sajali & Aziz approved by Defendant No 4?

According to the Internal Memo for Appointment of Solicitors, the recommendation was signed by the Assistant General Manager Credit on 4 August 1999 and approved by the General Manager Operations on 5 August 1999.)

15 Bilakah Tetuan Sajali & Aziz dimaklumkan oleh Defendan Ke-4 mengenai perlantikannya untuk mengendalikan urusan dokumentasi pinjaman Defendan Ke-5 ini?

Saya telah menyediakan satu surat daripada Defendan Ke-4 bertarikh 4 Ogos 1999 memberitahu bahawa Defendan Ke-4 telah meluluskan pinjaman sebanyak RM16 juta kepada Defendan Ke-5 dan meminta Tetuan Sajali & Aziz menyediakan dokumentasi yang perlu.

(15 When were Messrs Sajali & Aziz informed by Defendant No 4 regarding their appointment to deal with the matter of Defendant No 5's loan document?

I prepared a letter from Defendant No 4 dated 4 August 1999, notifying that Defendant No 4 had approved a loan of RM16m to Defendant No 5 and requested Messrs Sajali & Aziz to prepare the necessary documentation.)

16 Rujuk mukasurat 20, Ikatan B. Apakah dokumen ini?

Ini adalah surat Defendan Ke-4 kepada Defendan Ke-3 meminta menyediakan dokumentasi pinjaman Defendan Ke-5 tersebut.

(16 Refer to page 20, Bundle B. What is this document?

This is Defendant No 4's letter to Defendant No 3 requesting the preparation of loan documentation for Defendant No 5.)

17 Boleh terangkan bagaimana surat kepada Defendan Ke-3 bertarikh 4 Ogos 1999 sedangkan Memo Dalaman Perlantikan Peguam menunjukkan bahawa kelulusan perlantikan hanya ditandatangani pada 5 Ogos 1999?

Saya telah menyediakan surat bertarikh 4 Ogos 1999 kepada Defendan Ke-3 sebaik sahaja Memo Dalaman Perlantikan Peguam disokong oleh Penolong Pengurus Besar Kredit pada 4 Ogos 1999. Lumrahnya, Pengurus Besar Operasi tidak akan mempunyai

apa-apa halangan terhadap perlantikan peguam yang berada dalam panel peguam Defendan Ke-5 dan kelulusan beliau hanyalah untuk formality urusan dalaman Defendan Ke-4 sendiri.

(17 Can you explain how the letter to Defendant No 3 was dated 4 August 1999 while the Internal Memo for Appointment of Solicitors showed that the approval for the appointment was signed on 5 August 1999?

I prepared the letter dated 4 August 1999 to Defendant No. 3 as soon as the Internal Memo for Appointment of Solicitors was recommended by the Assistant General Manager Credit on 4 August 1999. Normally, the General Manager Operations would have no objection to the appointment of Defendant No 5's solicitors from the panel of solicitors and his approval is merely a formality for Defendant No 4's internal matter.)

18 Anda kenal Encik Abdul Aziz bin Ahmad?

Kenal.

(18 Do you know Encik Abdul Aziz bin Ahmad?

I know.)

19 Bagaimana anda kenal beliau?

Encik Abdul Aziz bin Ahmad adalah peguam dari Tetuan Sajali & Aziz yang berurusan dengan saya bagi urusan dokumentasi Defendan Ke-4.

(19 How do you know him?

Encik Abdul Aziz bin Ahmad is a lawyer from Messrs Sajali & Aziz who dealt with me in the matter of Defendant No 4's documentation.)

20 Adakah anda menerima deraf dokumentasi daripada Defendan Ke-3 seperti yang diminta dalam surat Defendan Ke-4 bertarikh 4 Ogos 1999?

Saya meminta deraf Asset Sale Agreement, Asset Purchase Agreement, Letter of Guarantee dan Annexure Charge daripada Defendan Ke-3 pada 6 Ogos 1999.

(20 Did you receive the draft documentation from Defendant No 3 as requested in Defendant No 4's letter dated 4 August 1999?

I received the draft Asset Sale Agreement, Asset Purchase Agreement, Letter of Guarantee and the Charge Annexure from Defendant No 3 on 6 August 1999.)

21 Apa yang anda buat selepas menerima deraf dokumentasi tersebut?

Deraf dokumentasi tersebut kemudiannya di 'vet' oleh jabatan undang-undang Defendan Ke-4 sebelum saya kembalikan semula kepada Defendan Ke-3.

(21 (21. What did you do after receiving the draft documentation?

The draft documentation was vetted by Defendant No. 4's legal department before I returned the same to Defendant No 3.)

[71] Learned counsel for the second and third defendants did not cross-examine SD5 in relation to the aforesaid testimony.

[72] SD6 Mohd Sabi bin Mohd Tahir, a manager of the fourth defendant, testified in Question and Answer 34 of his witness' statement that the third defendant was appointed to prepare the charge document.

[73] In my view, there is ample evidence adduced at the trial to support the finding that, on the application of the fifth defendant, the third defendant was appointed as solicitors to prepare the charge documents for which the fees had been paid by the fifth defendant to third defendant. Indeed, exh. D29 at pp 638–639 of the appeal record demonstrated that the borrower, ie the fifth defendant had applied to the fourth defendant to appoint the third defendant as the fifth defendant's solicitors for the loan facility and the fourth defendant had no objection to that application. In other words, the third defendant was appointed at the instance and on the application of the fifth defendant.

[74] In my respectful view, the evidence that the legal fees for the preparation and presentation of the charge documents had been paid by the fifth defendant to the third defendant has removed any doubt that the fifth defendant was the client of the third defendant in the loan transaction. The third defendant's retainer and appointment by the fifth defendant was supported by the fifth defendant's payment of legal fees. The fourth defendant, having approved the fifth defendant's application for the appointment of the third defendant as the fifth defendant's solicitors, can hardly be constituted as the client of the third defendant in the preparation and presentation of the charge documents. The absence of any contractual obligation on the part of the fourth defendant to pay for the legal fees has effectively negated the essential element of consideration which is fundamental in the formation of a solicitor and client relationship, in order to bring about a principal and agent relationship between the fourth and the third defendants.

ISSUE RAISED FOR FIRST TIME

[75] While it is true that the above core issue was not raised and argued before the court of first instance, I am of the view that in the interest of justice, the parties are at liberty to ventilate it at the appellate stage for the first time here, as this appeal is after all proceeded with by way of rehearing. It is the plaintiffs' learned counsel who has raised this core issue for the first time at the appellate stage in this court. I can find no reason to exclude this issue from hearing and determination.

[76] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (CA), the respondent sought to admit a new point for argument for the first time in the Court of Appeal. Gopal Sri Ram JCA, with whom VC George JCA (as he then was) and Abu Mansor Ali JCA (later FCJ) concurred, gave the answer as follows:

> In my judgment, the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

CONCLUSION

[77] On the foregoing grounds, I make the following orders:

(i) the plaintiffs' appeal is dismissed with costs to the chargee bank and the plaintiffs' deposit is to be paid to the chargee bank on account of taxed costs; and the learned trial judge's order on the indefeasibility of the chargee bank's interest as a registered chargee and the consequential orders are hereby affirmed;

(ii) in the absence of the second defendant at the hearing, his appeal is dismissed with costs to the chargee bank, and the second defendant's deposit is to be paid out to the chargee bank on account of taxed costs;

(iii) the solicitors' appeal is also dismissed with costs to the chargee bank and the solicitors' deposit is to be paid out to the chargee bank on account of taxed costs; and

(iv) the chargee bank's appeal against the trial judge's order staying the effect of his Lordship's judgment is allowed but with no order as to costs. The chargee bank's deposit is to be refunded to it.

Raus Sharif JCA:

[78] I have read the judgment in draft of my learned brother Gopal Sri Ram JCA. I agree with the views expressed and the orders made by his Lordship therein save for his views that 'the Federal Court's judgement in *Adorna Properties* must be disregarded'. With the utmost respect, I am of the view that despite the severe criticism that had been levelled against the Federal Court's judgement in Adorna Properties, it cannot be disregarded by this court. To do so would be to go against the principle of stare decisis.

[79] My concurrence with the orders made by my learned brother Gopal Sri Ram JCA is basically on one ground: that the learned trial judge was wrong in holding that the second defendant's knowledge of the fraud could not be imputed to the fourth defendant. My respectful view is that the learned trial judge, after holding that the second and third defendants were for all intent and purpose the agents of the fourth defendant and the second defendant was not just privy to the fraud but he was in fact a party to the fraud, should have found for the plaintiffs by reason of s 340(2)(a) of the National Land Code 1965 ('Code'). This is because the section expressly provides that the title of a proprietor may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party in which he or his agent colluded. In the instant case since the second and third defendants, as found by learned trial judge, were the agents of the fourth defendant and the second defendant was the party to the fraud, the charge registered in favour of the fourth defendant cannot be held to be valid and indefeasible.

[80] The learned trial judge's conclusion on the issue was largely based on the decision of the Federal Court in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85. But my respectful view, adopting the reasoning of my learned brother Gopal Sri Ram JCA, is that, *Doshi*'s case cannot relied upon in interpreting s 340(2) of the Code.

[81] My learned brother Low Hop Bing JCA in his draft judgement, which I had the opportunity to read, nevertheless agreed the learned trial judge's conclusion. But his grounds for sustaining the validity and indefeasibility of the registered charge were different from those of the learned trial judge.

[82] In essence, my learned brother Low Hop Bing JCA held that the second and third defendants were not the agents of the fourth defendant but the agents of the fifth defendant. According to my learned brother, since the fourth defendant was neither a party or privy to the fraud or misrepresentation, and that the party or parties who had perpetrated the fraud or misrepresentation were not the agents of fourth defendant, the indefeasibility of the fourth defendant's interest which has been registered secured by the charge remains unaffected by the circumstances set out in s 340(2) of the Code.

[83] With the utmost respect, I am unable to agree. My respectful view is that the issue that the second and third defendants were not the agents of the fourth defendant, but the agents of the fifth defendant, was not part of the fourth defendant's case before the learned trial judge. It was never pleaded in the fourth defendant's statement of defence. In fact the evidence adduced by the fourth defendant at the trial supported the fact that it was the fourth defendant who appointed the third defendant as the solicitors for the preparation and presentation of the charge documents.

[84] The Senior Executive Officer of the fourth defendant, Salmah bte Harun (SD5), in her witness statement, specifically stated that it was the fourth defendant who appointed the third defendant as the solicitors for the loan documentation. SD5 relevant statements in Bahasa Malaysia when translated into English are as follows:

Q: Which legal firm was appointed to prepare the loan documentation?

A: Messrs Sazali & Aziz.

Q: When did the fourth defendant approve the appointment of Messrs Sazali & Aziz?

A: According to the Memo of the Appointment of Solicitors, the recommendation was signed by the Assistant Credit Manager on 4.8.1999 and was approved by the Operation General Manager on 5 August 1999.

Q: When were Messrs Sazali & Aziz being informed by the fourth defendant regarding its appointment in handling the fifth defendant's loan documentation?

A: I prepared a letter from the fourth defendant dated 4 August 1999 informing that the fourth defendant has approved the RM16 million loan to the fifth defendant and asking Messrs Sazali & Aziz to prepare the relevant documentation.

Q: Do you know Abdul Aziz Ahmad?

A: I know him.

Q: How do you know him?

A: Encik Abdul Aziz bin Ahmad is a lawyer from Messrs Sazali & Aziz who I have been dealing with for the fourth defendant's documentation purposes.

[85] Messrs Sazali & Aziz and Abdul Aziz Ahmad referred to therein by SD5 were the third and second defendants respectively.

[86] The statements of SD5 on the matter were repeated in a witness statement's of another Senior Executive Officer of the fourth defendant, Mohd. Sabi bin Mohd Tahir (SD6). Hence, it was not surprising for the learned trial judge to conclude that it was common ground that the third defendant was retained by the fourth defendant to prepare the necessary legal documentation for the loan and therefore the second and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction.

[87] Thus, it is my respectful view that the learned trial judge, in light of the pleadings and the evidence before him, was perfectly right to hold that the second and third defendants were for all intent and purpose the agents of the fourth defendant in the said transaction. Nevertheless, he fell into error when he relied on *Doshi*'s case and concluded that fraud of the second defendant could not be imputed on the fourth defendant.

[88] On the above reasons, I would make the same orders as that of my learned brother Gopal Sri Ram JCA.

Plaintiff's appeal allowed.

Reported by Sivapragasam Kumaran